Petition

No. 81-769

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the power of Federal departments and agencies to fix the terms on which they fund education programs was limited by Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (*"Title IX"*), to proscribing only "purposeful and intentional" discrimination on the basis of sex.

2. Whether the Title IX regulations and federal funding contracts may validly prohibit criteria for admission to professional education which have the "effect" of sex discrimination (unless such criteria predict success in the program in question and alternative criteria are unavailable).

3. Whether the decision of this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974), continues to be viable.

4. Whether respondent's selection or reaffirmation of age policies, which were known to exclude a disproportionate number of women from federally-assisted medical education programs, could evidence purposeful and intentional discrimination.

PARTIES

In addition to The University of Chicago, the respondents are Northwestern University and the medical school admissions committee and officials at each university. The federal officials who had supported the position of petitioner as respondents on the writ of certiorari previously granted by this Court, Docket No. 77-926, were dismissed as parties in the district court after remand. Later, in the court of appeals, the Department of Justice filed a brief and presented oral argument on behalf of the United States as *amicus curiae*, again supporting the position of petitioner on the meaning of Title IX, the validity of the regulations and the enforceability of the schools' contractual obligation to observe those regulations.

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OCTOBER TERM, 1981

GERALDINE G. CANNON,

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v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the May 6, 1981 judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the captioned matter. This case previously was before this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

OPINIONS BELOW

The opinion of the court of appeals is reported officially at 648 F.2d 1104 (7th Cir. 1981), and unofficially at 49 U.S. Law Week 1187 and 2755. The slip opinion is set out in the attached

appendix. (pp. 1a-13a) The opinion of the district court was delivered orally by Senior Judge Julius J. Hoffman and has not been reported.

JURISDICTION

The judgment of the court of appeals is dated May 6, 1981. A timely petition for rehearing en banc was denied on June 22, 1981. On September 10, 1981, Justice Stevens extended the time for filing a petition for a writ of certiorari to October 20, 1981. No. A-213. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 901(a) of Title IX, 20 U.S.C. § 1681(a):

> No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except that:
>
> > (1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education. . . .

Section 902 of Title IX, 20 U.S.C. § 1632:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

Section 21(b)(2) of the Title IX Regulations, 45 C.F.R. § 86.21(b)(2) (now, 34 C.F.R. § 106.21(b)(2)):

> A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

STATEMENT OF THE CASE

In October, 1974, petitioner applied for admission to the 1975 entering class at each respondent medical school. She was an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and Medical College Admission Test scores, were higher than those of a substantial number of the students subsequently admitted by each school.

After administrative action by the Department of Health, Education and Welfare proved to be unavailable, petitioner commenced these actions in the summer of 1975. She claimed that the composition of the student body at each school reflected discrimination against women generally and that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. Specifically, she alleged that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age which had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice.[1] Reevaluation of her applications without regard to said policies, an opportunity

[1] The complaints are summarized in the prior opinion of this Court. 441 U. S. at 680-681.

to rebut any alternative explanation for her rejection, and other remedies were demanded. Alternatively, she sought to compel administrative action by HEW or to have HEW aligned as party plaintiff in her claim, as a third party beneficiary, to enforce contractual assurances against sex discrimination given by each school to HEW in order to obtain federal financial assistance.

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law, 28 U.S.C. § 1343 (4). Although each respondent school acknowledged receipt of federal financial assistance and its obligation not to discriminate on the basis of sex, the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX did not authorize a private right of action. The court of appeals affirmed. On certiorari to decide the question of private enforceability of Title IX, this Court on May 14, 1979, reversed and remanded the case for further proceedings.

On June 12, 1979, HEW, in promulgating the Final Rule under the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, declared that age restrictions are not necessary to the operation of medical education programs and are therefore prohibited by the Act. 44 Fed. Reg. 33773. Both respondent schools (and virtually every other medical school in the United States) then abolished their age restrictions for 1980 and subsequent entering classes.

On remand in the district court, the schools renewed their motions to dismiss the complaints for failure to state a claim. This time they asserted the complaints did not allege "purposeful and intentional" discrimination against women.[2]

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[2] Neither the district court nor the court of appeals decided the schools' alternative motions for summary judgment which were based on assertions that petitioner would not have been interviewed or accepted in the absence of age restrictions. Both schools admitted that other applicants with lower grades and test scores were accepted.

Petitioner moved to strike the renewed motions as inconsistent with this Court's statement that the "facts alleged in the complaints . . . establish a violation of § 901(a) of Title IX." 441 U.S. at 680. She opposed the renewed motions on the merits by asserting the validity of section 21(b)(2) of the Title IX regulation and the schools' contractual obligation to observe the regulations. She also opposed the motions on the ground that her allegation that respondents had acted "arbitrarily and invidiously" did encompass "purposeful and intentional" discrimination against women.

Petitioner claimed that nothing had occurred to change the necessity—or lack of necessity—for age restrictions in medical education between 1974 and 1979. She asserted that HEW's declaration on the Final Rule under the Age discrimination Act of 1975, unless challenged by the respondents, had mooted any issue as to the lack of necessity for age restrictions in admission to their medical education programs. Since the discriminatory effect of such restrictions on women was admitted *arguendo* by the motions to dismiss, petitioner further claimed that the restrictions violated Title IX and the Constitution, as well as the Title IX regulations and respondents' federal funding contracts.

Judge Hoffman, stating that petitioner had obtained a "pyrrhic victory" in this Court, granted the renewed motions and again dismissed the complaints for failure to state a claim under Title IX. The court of appeals affirmed. It held that (i) Title IX prohibits only "purposeful and intentional" discrimination, which was not sufficiently alleged, (ii) the regulation which imposed an "effect" standard is invalid, and (iii) *Lau* v. *Nichols* need not be followed. On October 5, 1981, this Court denied a petition for a writ of mandamus urging the inconsistency of the decision below with the prior decision of this Court in *Cannon*. (Docket No. 81-45).

REASONS FOR GRANTING THE WRIT

1. The court of appeals has decided an important question of federal funding as applied to women's rights under federal law which has not been, but should be, settled by this Court.

The question of the proper scope of Title IX, standing alone and as effectuated by federal regulations and funding contracts, should be settled by this Court, particularly where the question also relates directly to the scope of three other federal laws which are worded identically. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibits discrimination on the basis of race, color or national origin in programs receiving Federal financial assistance; section 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 794, prohibits discrimination solely by reason of a handicap in such programs; and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, prohibits discrimination on the basis of age in such programs. Title IX was patterned on Title VI and section 504 and the Age Discrimination Act in turn were patterned on Title VI and Title IX. These laws differ only in the types of discrimination and programs covered by each.

To hold that such legislation was intended by Congress to limit or restrict federal authorities in eliminating discrimination in federally-assisted programs to the pre-existing mandates of the Fifth and Fourteenth Amendments, flies in the face of all of the applicable legislative histories. It would have been an outrage in the situation sense of the Civil Rights Act of 1964 when Congress sought to eradicate the lingering effects of racial discrimination. It would convert that historic charter for liberty into additional shackles for the victims of discrimination.

In the case of Title IX, the intention of Congress to authorize regulations establishing an "effect" standard for discriminatory policies and practices is clear. When Congress avowedly patterned Title IX on Title VI in 1972, the regulations establishing an "effect" standard under Title VI had been

promulgated and in effect for several years. 45 C.F.R. § 80.3. That standard was subsequently upheld by the unanimous decision of this Court in *Lau* v. *Nichols, supra.*

The importance of the national effort to promote equal opportunities for all persons is clear. The importance of equal access to education in that effort has been abundantly established. This case presents to the Court, as a matter of first impression, the question of whether the primary federal statute prohibiting sex discrimination in education programs receiving federal financial assistance may utilize the "effect" standard established for racial discrimination under its predecessor legislation, Title VI, and approved by this Court in *Lau.*

Appropriately, the principle embodied in the published policies of the respondent schools here at issue is at the heart of the national effort to eliminate unreasonable sex discrimination. Exclusionary policies which utilize gender or race as express terms have been generally eliminated through federal civil rights enforcement efforts under Title IX and Title VI, respectively. When the relative academic and career patterns of men and women are examined it becomes clear that the respondent schools' admission policies could not have been more calculatedly aimed at excluding women without using gender as an express term. Virtually all medical schools had comparable policies as did many other graduate and professional schools.[3] The continuation of policies having the effect of sex discrimination by medical schools has been devastating in that now, ten years after explicit congressional prohibition of sex

[3] Petitioner alleged that persons excluded thereby are disproportionately female and profferred statistical data and expert testimony to support that claim. The basic explanation in the case of age criteria is simple. Many women interrupt their education to marry and raise children before completing graduate or professional education. Age and other criteria having similar disparate impact on women are discussed in "Discrimination Against Women," Hearings on § 805 of H. R. 16098, 91st Cong., 2d Sess.

discrimination in admissions to medical schools, even though more than 50% of all college graduates and about 85% of the personnel in the health care field are women, only about 25% of all medical students are women.

Sociological and statistical support for the significance and importance of petitioner's claim has been well documented. See, *e.g.*, U.S. Commission on Civil Rights, AGE DISCRIMINATION STUDY (1977); Walsh, DOCTORS WANTED, NO WOMEN NEED APPLY, (Yale Univ. Press 1977); REPORT OF THE COMMITTEE ON WOMEN, (Univ. of Chicago, 1970); Astin, THE WOMAN DOCTORATE IN AMERICA, (Russell Sage Foundation, New York 1969); and Lewis, DEVELOPING WOMAN'S POTENTIAL (Iowa State Univ. 1968).

The decision below rejects the position of every federal department and agency which has addressed the question by regulation. Brief of United States as *amicus curiae* in the court of appeals. *See* also, Executive Order 11246.

2. The decision below conflicts with applicable decisions of this Court pertaining to discrimination on the basis of race, color or national origin, and related issues.

This Court should grant certiorari to correct the conflict between the decision below and three decisions of this Court.[4]

[4] The decision also reflects the difficulty recently evident in two sharply conflicting decisions of other federal courts of appeals. *Compare: Castaneda* v. *Pickard*, ___ F.2d ___ (5th Cir. 1981), 50 U. S. Law Week 1011, 2016, 2021 (decided June 23, 1981), requiring "intentional" standard but affording relief thereunder, with *NAACP* v. *Medical Center, Inc.*, F.2d ___ (3d Cir. 1981), 50 U. S. Law Week 1011, 2032 (decided June 29, 1981), recognizing "effect" standard but denying relief thereunder. *Cf. McMahon* v. *Barclay*, 510 F.Supp. 1114 (S.D.N.Y. 1981), holding New York's statutory age limit of 29 for police applicants unconstitutional.

First, in *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court recognized the validity of an "effect" standard under Title VI as follows:

> We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 [of Title VI] to reverse the Court of Appeals. 414 U.S. at 566.
>
> Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 414 U.S. at 568 (emphasis in original).

The decision below expressly refused to follow *Lau*, ruling that isolated comments by members of this Court questioning one possible premise of Justice Douglas' opinion, which was not necessary to the decision, had, in practical effect, overruled *Lau*.

Quite apart from the authority of the court of appeals to reject a squarely applicable decision of this Court on the basis of speculation that a majority of this Court would overrule it, mere questioning whether Title VI, standing alone, prohibits discrimination which may not violate the Constitution, standing alone, certainly does not necessitate any rejection of the unanimous decision of this Court in *Lau*.[5] The concurring opinion of

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[5] The three Second Circuit decisions relied upon below, *Parent Assn. of Andrew Jackson H.S.* v. *Ambach*, 598 F. 2d 705 (2d Cir. 1980), *Lora* v. *Bd. of Education of the City of New York*, 623 F. 2d 248 (2d Cir. 1980), and *Bryan* v. *Koch*, 627 F. 2d 612 (2d Cir. 1980), all noted that *Lau* had not been overruled. *Parent Assn.* and *Lora* involved statutory limits on court ordered desegregation remedies not applicable here or in *Lau*. Bryan involved disparate treatment in local funding. Violation of the federal regulation and funding terms applicable to policies having discriminatory effect was not involved. See note 6 *infra*. The district court decision cited below, *Harris* v.

(Foonote continued on following page)

Justice Stewart in *Lau* itself, which the Chief Justice and Justice Blackmun joined, similarly questioned whether Title VI, standing alone, might not prohibit a policy having discriminatory effect.

> The petitioners do not contend, however, that the respondents have affirmatively or intentionally contributed to this inadequacy, but only that they have failed to act in the face of changing social and linguistic patterns. Because of this laissez-faire attitude on the part of the school administrators, it is not entirely clear that § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, standing alone, would render illegal the expenditure of federal funds on these schools. 414 U.S. 569-70.

After noting the provisions of the regulations and guidelines requiring affirmative efforts, he concluded:

> The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601. Last term, in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, we held that the validity of a regulation promulgated under a general authorization provision such as § 602 of Title VI "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969)." I think the guidelines here fairly meet that test. Moreover, in assessing the purposes of remedial legislation we have found that departmental regulations and "consistent administrative construction" are "entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1. 414 U.S. at 571.

Subsequently, in *Batterton* v. *Francis*, 432 U.S. 416 (1977), this Court held that a regulation promulgated under an express

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(Footnote continued from preceding page)

White, 479 F. Supp. 996 (D. Mass. 1979) is inapposite because the court did not consider the validity of federal regulations and funding terms in that employment decision. Since Title VII allegations were not dismissed, the Title VI ruling had little, if any, practical effect.

delegation and authorization by Congress is "entitled to more than mere deference or weight." 432 U.S. at 426. It can be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* Here, the legislative history demonstrates that Congress pointedly refused to define "discrimination" in order to allow the federal departments and agencies to implement the non-discrimination policy of the statute by regulation—as authorized in the statute itself. All Justices participating in the unanimous decision of this Court in *Lau* concurred in this holding.

> The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. *Oklahoma v. CSC*, 330 U.S. 127, 142-143. Whatever may be the limits of that power, *Steward Maching Co. v. Davis*, 301 U.S. 548, 590 *et seq.*, they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said:
>
> > "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, *or results in* racial discrimination." 414 U.S. at 563 (emphasis supplied).

By rejecting *Lau* on the basis of speculation as to the congruence—or lack of congruence—of the constitutional and statutory standards, the decision below confused the statutory mandate with the statutory authorization, as explained by Justice Stewart in *Lau* itself.

Second, the decision of the court of appeals conflicts with the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) decided under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* In *Regents of the Univ. of California* v. *Bakke*, 438 U. S. 265 (1978), five Justices, differing on the result, held, in the context of so-called "reverse" discrimination that Title VI, standing alone, prohibits only discrimination which violates the Constitution. In *United*

Steelworkers v. *Weber*, 443 U. S. 193 (1979), five Justices, agreeing on the result, held the same to be true under Title VII. Certainly most, if not all, members of this Court have questioned, or would question, whether Title VI, Title VII or Title IX, standing alone, prohibits any discrimination which the Constitution does not. Yet, this Court in *Griggs* squarely applied the test of "necessity" in the relevant context as the standard for justification of policies and practices having a discriminatory impact when supported by duly promulgated regulations of the federal agency having jurisdiction.[6] The Chief Justice illustrated the capability of the same rule to deny equal protection with the fabled offer of milk to the stork and the fox.

> Congress has now required that the posture and condition of the jobseeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is profferred be one all seekers can use. 401 U.S. at 431.

Thus, the decision below also conflicts with *Griggs*, again by confusing the statutory mandate with the statutory authorization.

Finally, the decision below conflicts with the decision of this Court in *Conley* v. *Gibson*, 355 U. S. 41 (1957) that "a complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S. at 45-46. Specifically, the court of appeals in conflict with *Conley:*

> (i) set out a "factual background" consisting almost entirely of material outside the complaints to reject peti-

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[6] *Bethlehem Steel Corp.* v. *Grant*, 634 F. 2d 1007 (2d Cir. 1981), held that the burden of proving necessity sufficient to overcome the inference of discriminatory motivation which may be drawn from discriminatory effect is greater in the case of a policy or practice having a disparate impact than in an individual case of disparate treatment. BRYAN, *supra* note 5, may be distinguished on this basis.

tioner's verified allegation, based upon data published by the schools, that she had higher academic qualifications than a substantial number of the accepted students, (App. pp. 2a-3a);[7]

(ii) overlooked petitioner's claim that she is within a large class of women who are victimized by facially-neutral criteria having a discriminatory effect; and

(iii) rejected petitioner's claim that the allegation respondents had acted "arbitrarily and invidiously" in selecting or reaffirming their age restrictions would allow proof of "intentional and purposeful" discrimination, (App. p. 12a).

Under *Conley*, the proper test is not whether her traditional "arbitrary and invidious" language incorporates any "necessary implication of intentional discrimination" (App.p.12a). The test is whether "it appears beyond doubt" that it could not. Specifically, it does not appear why petitioner could not prove that the age restrictions were "selected or reaffirmed, at least in part, 'because of' and not 'in spite of' their adverse effect" upon women, *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979), or as the "accidental by-product of a traditional way of thinking about women", *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (Stevens, J., concurring).

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[7] Petitioner's overall grade point average and total Medical College Admission Test scores were higher than at least 30% of the students accepted by both schools in 1975. The schools' assertion, accepted uncritically by the court of appeals (App. p. 3a), that 2,000 applicants with better qualifications also were rejected was based solely on the lowest subcategories of petitioner's grades and scores and not on the academic criteria published by the schools. It was an artifice prepared for this litigation. No explanation was offered for the disavowal of their own published criteria implicit in such assertion. Even on the asserted terms, Chicago admitted it had accepted four applicants with lower qualifications in 1975 and Northwestern, seven. Petitioner's grades and science subtest gave her an approximately 70% probability of admission.

Thus, the court of appeals decided the important question of women's rights under federal law presented by this case in conflict with applicable decisions of this Court in *Lau, Griggs,* and *Conley.*

Further, by denying to women seeking enforcement of rights secured by Title IX the same procedure afforded by the decisions of this Court in *Lau* for rights secured by Title VI, the decision below rejected the substantial legislative history and obvious identity of language that compel similar interpretation. The rejection of *Lau* fails to account for the pointed reliance by this Court in *Lau* on the regulation and related federal funding contract, as well as on the statute.

Additionally, from a policy viewpoint, litigation involving Equal Protection Clause arguments related to more specific Title VI or Title IX regulations and funding contracts certainly should be resolved short of the constitutional grounds, as this Court did in *Lau.* The refusal to reach the Equal Protection Clause argument in *Lau* reflected the deeply-rooted doctrine of avoiding constitutional decisions when other grounds may be dispositive. There is no reason for the federal courts to embark on complicated determinations of whether the applicable regulations, which undoubtedly will become more specific with experience, are *required* by the Constitution. Cases such as *Bakke* and *Weber* are peculiar in this respect and illustrate the point. Yet the legislative scheme urged in the courts below would require precisely such difficult constitutional judgments in all such cases. Determination of whether the regulations comport with the statutes certainly is a preferable standard from the standpoint of judicial economy, let alone the basic national policy of the civil rights statutes themselves.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

Opinion of court of appeals
filed May 6, 1981

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1763

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,
and NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 2724—Julius J. Hoffman, *Judge.*

ARGUED SEPTEMBER 24, 1980—DECIDED MAY 6, 1981

Before PELL, *Circuit Judge,* SKELTON, *Senior Judge,** and WOOD, *Circuit Judge.*

PELL, *Circuit Judge.* Plaintiff-appellant Geraldine G. Cannon comes before this court for a third time in her effort to gain admission to the defendants' medical schools. She was denied admission for the 1975 academic year and has been involved in litigation over the denials at all levels of the federal judiciary since that time. In her complaints, appellant claimed that the defendants' failure to admit her violated the age and sex discrimination prohibitions of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871,

* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

42 U.S.C. § 1983, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and Illinois law, Ill. Rev. Stat. ch. 48 § 884 *et seq.* The Title IX allegations are the only viable allegations remaining. Initially, the defendants moved to dismiss those allegations pursuant to Fed.R.Civ.P. 12 (b)(6) on the ground that no private right of action existed under Title IX. The district court granted these motions, 406 F.Supp. 1257 (N.D. Ill. 1976), and this court affirmed, 559 F.2d 1063 (7th Cir. 1976). After reviewing the case upon a petition for certiorari, the Supreme Court reversed, holding that a private right of action was implied under Title IX. 441 U.S. 677 (1979). Upon remand to the district court, the defendants filed renewed Rule 12(b)(6) motions to dismiss the complaints, this time on the ground that Title IX prohibits only intentional discrimination and that appellant had failed to allege such purposeful conduct by the defendants in her complaints. Following the denial of appellant's motion for a preliminary injunction which was affirmed by this court, the district court granted defendants' renewed motions to dismiss and denied appellant's cross-motions to strike. Appellant's present appeal is from those orders.

I

The factual background of this case has been set forth in the earlier opinions of the district court and this court. A short repetition, however, may be of some assistance.

The present appellees, Northwestern University Medical School and the Pritzker School of Medicine at The University of Chicago, were two of the ten medical schools to which appellant unsuccessfully applied in 1975. Her undergraduate grade point average (GPA) in science and math related courses was 3.17 of a possible 4.00. The average GPA in these courses of the accepted applicants at the Pritzker School was 3.70 and at least 50% of all applicants to Northwestern had higher GPAs than appellant. On the science portion of the medical college admission test, appellant scored in the lower half of the applicant group to the defendant schools. On the quantitative portion of the test, she scored in the bottom

half of the applicants to Northwestern and in the bottom 20% of the applicants to the University of Chicago.

In 1975, only 110 of over 6700 applicants were accepted at Northwestern while only 104 of 5427 applicants were accepted at Chicago. The Dean of the Pritzker School stated in an affidavit that at least 2000 applicants with better academic qualifications than appellant were rejected. At Northwestern, only seven applicants with lower academic qualifications were admitted: five blacks and two women. During the period from 1971 to 1975, 18.1% of the applicants to the Pritzker school were women while 18.3% of the entering classes were women, and 2.2% of all women applicants were admitted while 2.1% of all male applicants were admitted.

Appellant's suits, which were consolidated in the district court's dismissal, are based upon the admission policies of the defendant schools which in 1975 either discouraged individuals over the age of 30 from applying, or, in the case of Northwestern, prohibited the admission of any applicant over the age of 35 who did not possess an advance academic degree. At the time of her application, appellant was 39 years old and had no such degrees. She asserts that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women. Appellant claims that the defendants' age policies therefore resulted in sexual discrimination violative of Title IX.[1]

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[1] Appellant's argument on this issue is somewhat confused. It is clear from the district court's opinion given orally in court that the primary issue before it was the proper standard to be imposed under Title IX; *i.e.*, whether that statute could be violated by disparate impact alone. In her brief to this court, however, appellant maintains that the district court's holding that the constitutional (intentional) standard applied was "premature" because she "propose[d] to meet the constitutional standard" in the district court. Only as a secondary argument here does the appellant assert that a disparate impact alone is sufficient to violate Title IX. We shall approach the problem as did the district court and first address whether the intentional-conduct standard applies under Title IX.

II

Before we proceed to discuss the central issue on this appeal, that is, whether Title IX incorporates an intentional discrimination test or a disparate impact test, we must first address appellant's argument that the Supreme Court decided finally the issue before us now in its previous decision in this case. Appellant asserts that because the Court reversed the prior dismissal of her complaints granted on the ground that she failed to state a claim, the Court implicitly found her complaints to be adequate for the purposes of all further Rule 12(b)(6) motions.

This contention may quickly be dismissed. The only issue before the Supreme Court on the prior appeal in this case was whether Title IX implied a private right of action. The Court did not consider any other potential ground for dismissal of appellant's complaints in its opinion. This was made clear in the opinion of Justice Stevens for the Court:

> Accepting the truth of [appellant's] allegations for the purposes of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in the federal court. 559 F.2d 1063. We granted certiorari to review that holding. 438 U.S. 914

Cannon v. The University of Chicago, 441 U.S. 677, 680 (1980) (footnote omitted). The fact that the Supreme Court and this court assumed *arguendo* the sufficiency otherwise of appellant's complaints for the purposes of the prior appeal does not disallow the appellees' attack on those assumptions here.

III

Addressing the merits of the district court's opinion, we note that the Supreme Court in *Cannon* indicated that we should look to Title VI for guidance regarding

the proper interpretation of Title IX.[2] 441 U.S. at 694-96. Looking to Title VI, it appears that in the past it has been assumed to apply the disparate impact test. This was the result of the Supreme Court's action in *Lau v. Nichols*, 414 U.S. 563 (1974), upholding certain regulations promulgated by HEW under Title VI. The regulations provided that school systems receiving federal financial assistance "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination," or have "the effect of defeating or substantially impairing accomplishment of the objectives of the programs as respects individuals of a particular race, color, or national origin." 414 U.S. at 568, *quoting* 45 C.F.R. § 80.3(b)(2). In the opinion by Justice Douglas, the Court noted that the defendant school district had "contractually agreed to 'comply with Title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 C.F.R. Part 80) which are 'issued pursuant to that title . . .'" 414 U.S. at 568-69, and concluded that "[w]hatever may be the limits of [the Federal Government's power to fix the terms on which its money allotments to the States shall be disbursed] . . . they have not been reached here." *Id.* at 569 (citations omitted). The Court therefore reversed a court of appeal's holding that no relief was available under the regulations.

The implication in *Lau* that the disparate impact or effects test applied under Title VI became subject to question by the later language in *Board of Regents v.*

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[2] Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

Title IX, 20 U.S.C. § 1681, provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.
> . . .

Bakke, 438 U.S. 265 (1978). In that case where the Supreme Court invalidated an affirmative action special admissions program at the University of California Medical School, Justice Powell was of the opinion that Title VI should be held to impose the intentional discrimination standard. After discussing the legislative history of Title VI, he concluded:

> In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.

438 U.S. at 287. A violation of the Equal Protection clause had previously been held to require a finding of intentional discrimination; disparate impact alone will not support a cause of action under the Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

Though the dissenters in *Bakke* felt that the affirmative action program at the University should have been upheld, the opinion by Justice Brennan joined in by Justices White, Marshall and Blackmun concurred in Justice Powell's statement that the constitutional standard applied under Title VI:

> We agree with Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection clause of the Fourteenth Amendment itself.

438 U.S. at 325

> In our view, Title VI prohibits only the uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; . . ."

Id. at 328. The dissenters later expressly questioned the continued viability of the *Lau* implications after the *Bakke* decision:

> We recognize that *Lau* when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976), which rejected the general proposi-

> tion that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least in some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Id. at 352.

In a recent Supreme Court opinion, Justice Marshall, joined by Justice Brennan and Justice Blackmun, concurred and expressed similar sentiments:

> In *Bakke*, five members of the Court were of the view that the prohibitions of Title VI—which outlaw racial discrimination in any program or activity receiving federal financial assistance—are coexistent with the Equal Protection guarantees of the Fourteenth Amendment.

Fullilove v. Klutznick, 48 U.S.L.W. 4979, 4998 n.1 (July 2, 1980). Similarly, in *Board of Education v. Harris*, 444 U.S. 130 (1979), the Court clearly indicated that *Lau* is not dispositive of the issue of the standard under Title VI. In that case, the Court held that certain sections of the Emergency School Aid Act (ESAA) incorporated the disparate impact standard for testing illegal racial discrimination. When addressing the Board's argument that because Title VI required intentional discrimination for a violation so should the ESAA, the Court stated:

> There is . . . no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Consideration of that issue would be necessary only if there were a

> positive indication either in Title VI or in ESAA that the two Acts were intended to be coextensive.

Id. at 149.

* * *

> It does make sense to us that Congress might impose a stricter standard under ESAA than under Title VI of the Civil Rights Act of 1964. A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when the ESAA violation is found.

Id. at 150.

> ESAA was an attempt by Congress to bring about the same remedy without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination.

Id. at n. 13.

The dissent in *Board of Education* by Justice Stewart with Justices Powell and Rhenquist joining, also assumed that the *Lau* implication was not good law on this point. The Justices expressed the opinion that the intent standard should apply alike to the ESAA and Title VI. When addressing the majority's argument that the legislative history of § 703 of the ESAA, the so-called Stennis Amendment, indicated that the section was to impose only the disparate-impact test, Justice Stewart stated:

> My difficulty with this reasoning stems from the fact that the Stennis Amendment is applicable not only to ESAA, but also to Title VI of the Civil Rights Act of 1964, and the latter has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, five members of the Court concluded that Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination

> violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth. *Id.* at 281-287 (Powell, J.); *id.* at 325-355 (Brennan, J., White, Marshall, and Blackmun, J.J.). Those constitutional provisions, in turn, have been construed to reach only purposeful discrimination. *Dayton Board of Education v. Brinkman*, 433 U.S. 406; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252; *Washington v. Davis*, 426 U.S. 229; *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189. It thus follows from *Bakke* that Title VI prohibits only purposeful discrimination.

Id. at 159-60, *and see id.* at 162.

It would seem from the above quoted language that seven of the Justices of the Supreme Court support the view that a violation of Title VI requires intentional discrimination.[3] We agree that this is the better view and other courts are in accord. In *Parents Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979), for example, the court noted that at least in school discrimination cases, Title VI should be held to impose the intentional discrimination standard. The court distinguished its earlier opinion in *Board of Education of New York City v. Harris*, 584 F.2d 576 (2d Cir. 1978), *affirmed on other grounds*, 444 U.S. 130 (1979), where it had held that Title VI was violated by disparate impact alone in an employment discrimination context. The court noted that the earlier opinion had relied upon an analogy to Title VII which had been held to impose the disparate impact test, but decided that in the school case, the proper analogy would be to Title IV which by its terms imposed the higher intentional dis-

[3] The three Justice plurality opinion in *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (1980), does not alter this conclusion. In *Fullilove*, the Chief Justice cited *Lau* as an example of a broad interpretation of Congress' power to remedy discrimination. The citation does not serve as a reaffirmance of the *Lau* implications at issue here especially since Justice Burger's opinion was joined in by Justices Powell and White who expressed the view in *Bakke* that Title VI imposes the intentional discrimination standard.

crimination standard. 598 F.2d 716, *see* 42 U.S.C. § 2000c-6. The court held, therefore, that the higher standard ought to apply under Title VI in the school discrimination area. In agreement is the detailed opinion in *Bryan v. Knoch*, 492 F.Supp. 212, 229-33 (S.D.N.Y.), *affirmed*, 627 F.2d 612 (2d Cir. 1980), where the court held that the closing of a city hospital must be shown to have been intentionally discriminatory to be a violation of Title VI, *Lora v. Board of Education*, 623 F.2d 248, 250 (2d Cir. 1980), which held that the assignment of handicapped children to special schools must be shown to be intentionally discriminatory to violate Title VI, and *Harris v. White*, 479 F. Supp. 996, 1002 (D. Mass. 1979), which held the intent standard applied to a Title VI challenge to a city's employment practices. *Board of Education* discussed in *Parents' Association* and which relied upon *Lau* in reaching its conclusion that Title VI imposed the disparate impact test in the employment discrimination area, would not seem to aid significantly appellant's position here in light of the Supreme Court's distinguishing Title VI from the ESAA in its affirmance of the case, and the Second Circuit's narrowing of the *Board of Education* holding in *Parents' Association*.

In short, we believe that a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly.

IV

The complaints appellant filed in these actions contain no express allegations that her applications to the defendants' medical schools were purposefully or intentionally rejected because of her sex. It is clear from the text of her complaints that appellant's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women. With regard to the Title IX claims, the complaints allege simply:

A material criterion for defendants' denial of plaintiff's application for admission to the September 1975 entering class at [the defendants'] Medical School[s] was her age which, in the circumstances of application to medical school, is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school[s]. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*, as amended by Title IX of the Education Amendments of 1972, P. L. 92-318, § 901(a) which provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

and the specific regulations promulgated by the Department of Health, Education and Welfare thereunder, 45 C.F.R. § 86.21(b)(2) which provides:

> "A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criterion which do not have such a disproportionately adverse effect are shown to be unavailable."

This claim of disparate impact,[4] even when coupled with the allegations made in appellant's brief to this court that the defendants knew of this impact while enforcing their age policies, is insufficient to establish a violation of Title IX. *Personnel Administrator v. Feeney,*

[4] It goes without question, of course, and appellant has not contended otherwise, that the regulation can not impose a standard broader than that imposed by this statute.

442 U.S. 256, 279 ("'Distriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.'") (citation and footnote omitted); *Lora, supra*, at 250 (" . . . 'foreseeable result' . . . standing alone is not sufficient to establish the requisite discriminatory intent . . ." *citing Columbus Board of Ed. v. Penick*, 443 U.S. 449, 462 (1979)). An illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact.

Nor do we believe that appellant's allegations under her § 1983 claims that defendants acted "arbitrarily and invidiously . . . in violation of the Fourteenth Amendment" are sufficient. These claims were dismissed by the district court after its original hearing because of appellant's failure to allege sufficient state action. The dismissal was affirmed by this court and appellant failed to seek review in the Supreme Court. The statements in these claims, therefore, are inapplicable to appellant's separate claims under Title IX. Even if the language were applicable, however, we would still find it inadequate. Notwithstanding the liberal pleading requirements of Fed. R. Civ. P. 9(b), the generic "arbitrary and invidious" language does not incorporate any necessary implication of intentional discrimination, and we agree with the district court that the allegation that the policies were "in violation of the Fourteenth Amendment" is nothing but a legal conclusion. *Plate v. Shepard*, 446 F.2d 1239, 1244 (6th Cir. 1971). In short, appellant has alleged nothing more than that a facially neutral age policy had a disparate impact upon women due to the domestic role they have traditionally assumed prior to continuing their education. No allegations have been made from which it can be inferred that it was more likely than not that discriminatory considerations were involved in the defendant's actions. *Compare, Daye v. Harris*, ... F.2d ....., (No. 79-2371, D. C. Cir., Jan. 15, 1981). The disparate effect alone, even if established, would not warrant relief under Title IX. The district court therefore was correct in dismissing appellant's complaint for failure to state a claim.

V

For the reasons stated previously, the district court's dismissal of appellant's complaint is affirmed. In doing so, we express no opinion on the defendants' alternative argument that the record as it presently exists establishes a sufficient legitimate explanation for appellant's rejection to avoid liability even under the disparate impact standard. Although the defendants' argument is persuasive on this issue, we need not now venture into areas the district court found no need to investigate.

AFFIRMED.

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No. 81-769

In the
Supreme Court of the United States
October Term, 1981

GERALDINE G. CANNON,
Petitioner,
vs.
THE UNIVERSITY OF CHICAGO, *et al.*
and NORTHWESTERN UNIVERSITY, *et al.*,
Respondents.

JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF CHICAGO, ET AL. AND NORTHWESTERN UNIVERSITY, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-769

GERALDINE G. CANNON,

Petitioner,

vs.

THE UNIVERSITY OF CHICAGO, *et al.*
and NORTHWESTERN UNIVERSITY, *et al.*,

Respondents.

JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF CHICAGO, ET AL. AND NORTHWESTERN UNIVERSITY, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Geraldine G. Cannon asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit based on her contention that the Court of Appeals, in its opinion issued May 6, 1981,[1] erred in affirming the dismissal of her complaints for failure to state a claim upon which relief may be granted.

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[1] *Cannon* v. *University of Chicago*, 648 F.2d 1104 (7th Cir. 1981). A copy of the Court of Appeals' opinion is attached to the Petition at 1a.

Specifically, Mrs. Cannon argues that the Court of Appeals erred in ruling that a cause of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, as in the case of an action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, "requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation." (648 F.2d at 1109; App. 10a). Consequently, she claims that the courts below erred in granting Respondents' motions to dismiss under Fed.R.Civ.P. 12(b)(6) based upon her failure to plead an essential element of a Title IX action: namely, that Respondents had acted with the purpose and intent of denying her admission to medical school because of her sex.

Respondents The University of Chicago, Northwestern University, and their respective medical school admissions officials respectfully submit that the decision of the Court of Appeals was fully consistent with previous decisions of this Court and that the Petition should be denied.

STATEMENT OF THE CASE

Geraldine G. Cannon applied for admission to the September, 1975 entering classes at the medical schools of The University of Chicago and Northwestern University. She was not offered admission to either institution.[2]

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[2] Mrs. Cannon also sought admission to eight other medical schools in 1975 and was not admitted to any of them. (Transcript of Proceedings on Plaintiff's Application for a Preliminary Injunction, September 21, 1979, at 74-75). In 1979 she filed suit against the five other medical schools in Illinois. *Cannon* v. *University of Health Sciences/The Chicago Medical School, et al.*, No. 79 C 5009 (N.D. Ill.).

On July 18, 1975, she filed her complaint against The University of Chicago and various of its officials, alleging that their failure to admit her violated the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871 (42 U.S.C. §1983), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 *et seq.*), and the Illinois prohibition against age discrimination (Ill. Rev. Stat., ch. 48, §884 *et seq.*). On August 4, 1975, Mrs. Cannon filed a nearly-identical complaint against Northwestern University and certain of its officials.

Subsequently each Defendant moved to dismiss the complaints for failure to state a claim and lack of subject matter jurisdiction, arguing, with respect to her Title IX claims, that the Education Amendments of 1972 do not provide for a private right of action. On January 15, 1976, the District Court granted the motions. *Cannon* v. *University of Chicago*, 406 F.Supp. 1257, 1259 (N.D. Ill. 1976).

On appeal, the Court of Appeals for the Seventh Circuit affirmed the judgment in its entirety. *Cannon* v. *University of Chicago*, 559 F.2d 1063 (7th Cir. 1976). The dismissal of Plaintiff's Title IX claims was upheld because the Court of Appeals concluded, "It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act." (559 F.2d at 1073).

Certiorari was granted to review the Title IX private action issue. On December 14, 1979, this Court reversed, concluding "[t]hat Petitioner does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex." *Cannon* v. *University of Chicago*, 441 U.S. 677, 680 (1979). The cases

were remanded to the Court of Appeals and then the District Court "for further proceedings consistent with this opinion." (*Id.* at 717).

Each of the universities thereupon filed new motions to dismiss the Amended and Supplemental Complaints in the District Court for failure to state a claim upon which relief may be granted.[3] The basis for the motions was that, although Mrs. Cannon had a private right of action under Title IX, she had failed to allege an essential element of such an action: *viz*, that the universities had acted with the purpose and intent of discriminating against her because of her sex. Ruling on these motions was stayed while Mrs. Cannon was granted an emergency six-day hearing on her application for a preliminary injunction, which was denied by the District Court on October 2, 1979. This denial was affirmed by the Court of Appeals on April 25, 1980.[4] The universities then re-

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[3] Northwestern University also filed an alternative motion for summary judgment, and The University of Chicago renewed its motion for summary judgment that had been pending since before the initial appeal. Supporting affidavits from The University of Chicago disclosed that there were "at least 2,000 [applicants not offered admission] who had better academic qualifications then did Mrs. Cannon." Affidavits submitted by Northwestern established that "several thousand applicants who were as well or better qualified for admission were also rejected." Thus, the universities contended that Mrs. Cannon could not carry her burden of demonstrating that her rejection was in any way caused by her sex or that she had suffered any injury as a result of any unlawful conduct. The District Court never had occasion to reach these motions because it granted the alternative motions to dismiss.

[4] *Cannon* v. *University of Chicago*, No. 79-2207 (7th Cir., April 25, 1980). The Court of Appeals also denied Plaintiff's Petition for Emergency Writ of Mandamus

newed their still-pending motions to dismiss before the District Court. On May 23, 1980, the Court granted the motions and dismissed the Amended and Supplemental Complaints for failure to state a claim.

On appeal, the Court of Appeals affirmed.[5] *Cannon* v. *University of Chicago*, 648 F.2d 1104 (7th Cir. 1981). The Court of Appeals ruled that the District Court had correctly interpreted Title IX as prohibiting only purposefully-discriminatory acts. The dismissal was upheld because of the failure of the complaints to allege that her applications to the medical schools of The University of Chicago or Northwestern University had been purposefully or intentionally rejected because of her sex. (648 F.2d at 1109-10).[6]

On October 5, 1981, this Court denied Mrs. Cannon's Petition for Writ of Mandamus (*In re Geraldine G. Cannon*, No. 81-45 (U.S.)), in which she claimed that the Court of Appeals' decision was inconsistent with the mandate of this Court following its 1979 decision.

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[4] (Continued)
(*Cannon* v. *Hoffman*, No. 79-2117 (7th Cir., October 16, 1979)), and Application for Extraordinary Writ or Rule Nisi (*Cannon* v. *Parsons*, No. 79-2118 (7th Cir., October 16, 1979)).

[5] Prior to filing her appeal, Mrs. Cannon filed another Petition for Emergency Writ of Mandamus, which the Court of Appeals denied on May 30, 1980. *Cannon* v. *Hoffman*, No. 80-1736 (7th Cir., May 30, 1980).

[6] In view of its affirmance of the District Court's dismissal for failure to state a claim, it was not necessary for the Court of Appeals to consider the universities' alternate contention that they were entitled to summary judgment. Nonetheless, the Court of Appeals noted that "defendants' argument is persuasive on this issue." (648 F.2d at 1110).

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Properly Affirmed the Judgment of the District Court Dismissing Petitioner's Complaints because of Her Failure to Allege Purposeful Discrimination by Respondents.

a. Decisions of this Court Have Established that Title IX Prohibits Only Purposefully-Discriminatory Conduct.

The Court of Appeals was clearly correct in its holding below that:

> "a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly." (648 F.2d at 1109).

This Court has established that Title IX was modeled after and must be interpreted consistently with Title VI of the Civil Rights Act of 1964. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 694-709. At least seven members of this Court have recognized that the prohibitions of Title VI and, hence, Title IX are identical to the constitutional standard of discrimination. *See Regents of the University of California* v. *Bakke,* 438 U.S. 265, 284-287 (1978) (opinion of Powell, J.); *id.,* 438 U.S. at 328-350 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Cannon* v. *University of Chicago, supra,* 441 U.S. at 748 n. 19 (opinion of Powell J., dissenting on other grounds); *Board of Education* v. *Harris,* 444 U.S.

130, 160 (1979) (opinion of Stewart, Powell, and Rehnquist, JJ., dissenting on other grounds); *Fullilove* v. *Klutznick*, 448 U.S. 448, 517 n.1 (1980) (opinion of Marshall, Brennan, and Blackmun, JJ., concurring).[7]

This Court has repeatedly held that the constitutional standard of discrimination requires "[p]roof of discriminatory intent or purpose." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Mere contentions that a neutral law or policy has a disproportionately adverse effect on a racial minority or women do not state a violation of the constitutional standard of discrimination, even where such an effect can be anticipated. *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272, 278-79 (1979).

Consequently, the Court of Appeals correctly held that a plaintiff, in order to establish a violation of Title IX, must affirmatively plead and prove purposeful sex discrimination.[8]

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[7] While Petitioner argues at p. 6 of her Petition that such a construction of Title VI "flies in the face of all of the applicable legislative histories," Petitioner fails to cite this Court to any portion of such histories. This Court exhaustively reviewed the legislative history of Title VI in *Bakke;* it was on the basis of this painstaking review that five Justices concluded that Title VI was intended to embody the constitutional standard of discrimination.

[8] The Court below also correctly noted that other lower federal courts since this Court's *Bakke* decision have interpreted Title VI as requiring a showing of purposeful discrimination. *See Castaneda* v. *Pickard*, 648 F.2d 989, 1000-1001 (5th Cir. 1981); *Guardians Assoc. of New York City Police Dept., Inc.* v. *Civil Service Commission*, 633 F.2d 232, 254 (2d Cir. 1980); *Lora* v. *Board of Education of the City of New York*, 623 F.2d 248, 250 (2d Cir.

b. The Decision Below Is Not Inconsistent with Prior Decisions of this Court.

Notwithstanding these clear pronouncements by this Court, Petitioner contends that the decision below conflicts with three decisions of this Court: *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and *Conley* v. *Gibson*, 355 U.S. 41 (1957). None of these purported conflicts requires review of the decision below.

In *Lau*, the Court merely applied regulations promulgated by HEW that contained a disparate effects standard under Title VI. Justice Douglas' majority opinion contained no discussion of the legislative history of Title

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[8] (Continued)
1980); *Parent Assoc. of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 716 (2d Cir. 1979); *Harris* v. *White*, 479 F.Supp. 996, 1002 (D. Mass. 1979). *See also Crocker* v. *Boeing Co.*, 50 U.S.L.W. 2228 (9th Cir., Sept. 30, 1981) (*en banc*) (showing of purposeful discrimination required under 42 U.S.C. §1981). *But see N.A.A.C.P.* v. *Medical Center, Inc.*, 657 F.2d 1322, 1331 (3rd Cir. 1981) (*en banc*); *Board of Education* v. *Califano*, 584 F.2d 576, 589 (2d Cir. 1978) (*dicta*), *aff'd on other grounds sub nom. Board of Education* v. *Harris*, 444 U.S. 130 (1979).

Respondents are not aware of any decisions that have construed Title IX in a way inconsistent with the decision below. Respondents submit that, if this Court believes it necessary to resolve any conflict between the Courts of Appeals with respect to the meaning of the prohibitions in Title VI, such a resolution would be more appropriate in a case arising under Title VI, rather than one arising under Title IX.

VI. No attempt was made to discern the intent of Congress with respect to the scope of Title VI's prohibitions.[9]

The assumed premise of *Lau*, that Title VI reaches disparate impact-based discrimination, has clearly been rejected by a majority of this Court. The opinion of Justices Brennan, White, Marshall, and Blackmun in *Bakke* expressly recognized the demise of this aspect of *Lau* based on a careful review of Congress' intent in passing Title VI.[10] The subsequent statements of Justice Powell in *Cannon* and Justices Stewart and Rehnquist in *Harris* have firmly established

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[9] Only Justice Stewart, in his concurring opinion joined in by the Chief Justice and Justice Blackmun, considered whether the Title VI prohibitions reached beyond purposeful discrimination, noting that, "[I]t is not entirely clear that §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, standing alone would render illegal the expenditure of federal funds on these schools." (414 U.S. at 570).

[10] "We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision." (438 U.S. at 352).

that any such indication in *Lau* has effectively been overruled.[11]

The decision below is not inconsistent with *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). As Petitioner acknowledges, *Griggs* interpreted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, not Title VI or Title IX. This Court expressly distinguished the disparate-impact standard applied under Title VII from the constitutional standard of discrimination in *Washington* v. *Davis*, 426 U.S. 229, 238-239 (1976):

> "As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the con-

[11] Having concluded that the more recent pronouncements of this Court establish that Titles VI and IX prohibit only purposeful discrimination, the Court below properly refused to follow the interpretative regulations issued by the Department of Health, Education and Welfare under Title IX, which embody a disparate-impact standard. (45 C.F.R. §86.21(b)(2)). As the Court correctly observed, "It goes without question, of course, and appellant has not contended otherwise, that the regulation cannot impose a standard broader than the statute." (648 F.2d at 1109 n.4; App. 11a). This Court has established that agency interpretations are to be accorded no weight if they are found to be "not in accordance with law." *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). The United States, which submitted an *amicus curiae* brief in the Court of Appeals, candidly acknowledged that, "Where the language of the statute or its legislative history reveals that Congress intended for an intent standard to apply in a particular area, an agency has no authority to adopt conflicting regulations." (Brief of United States as *Amicus Curiae*, at 29 n.33). These are clearly the circumstances here.

> stitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."

See also United Steelworkers of America v. *Weber*, 443 U.S. 193, 206 n.6 (1979). where this Court was careful to point out that Titles VI and VII of the Civil Rights Act of 1964, because of their different constitutional sources, "cannot be read *in pari materia*."

Finally, there is no need to review the decision below to test its compliance with *Conley* v. *Gibson*, 355 U.S. 41 (1957). The Court of Appeals properly viewed the facts alleged by Petitioner in the most favorable light but correctly concluded that her complaints failed to allege an essential element of a Title IX action:

> "In short, appellant has alleged nothing more than that a facially neutral age policy had a disparate impact upon women due to the domestic role they have traditionally assumed prior to continuing their education. No allegations have been made from which it can be inferred that it was more likely than not that discriminatory considerations were involved in the defendant's actions. [Citation omitted]. The disparate effect alone, even if established, would not warrant relief under Title IX." (648 F.2d at 1110; App. 12a).

Even if Petitioner were to prove all of the factual allegations of her complaints, she would not be entitled to relief because of her failure to plead, and hence to prove, that the universities acted with a discriminatory purpose because of her sex.

II. The Undisputed Facts Establish that Petitioner Was Not Denied Admission because of Her Sex.

A further reason for denying the Petition is that the undisputed facts clearly demonstrate that Petitioner was not denied admission to the medical schools of either The University of Chicago or Northwestern University because of any allegedly-discriminatory admissions policy regardless of the applicable standard under Title IX.[12] Petitioner was not entitled to admission because of her academic credentials, regardless of her age or sex.

Affidavits submitted by Respondent The University of Chicago established that, of the 5,427 applicants for the 104 places available in the fall 1975 entering class, 1897 other rejected applicants had better academic qualifications than did Mrs. Cannon on each of the three critical objective criteria: undergraduate science grade point average and Medical College Admission Test science and quantitative scores. (Aff. of R. Lawrence Richards, Exs. I and II). Similar affidavits filed by Northwestern University showed that, of the 6,700 applicants for the 116 places available in the fall 1975 entering class, several thousand who were as well as or better qualified than Petitioner were also rejected. (Aff. of Dr. Charles A. Berry, para.

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[12] The affidavits submitted by the universities in support of their motions for summary judgment were not contradicted by Petitioner.

The District Court did not reach the alternate motions for summary judgment because it granted the motions to dismiss. The Court of Appeals also found no need to consider the summary judgment question, but did expressly observe that "the defendants' argument is persuasive on this issue." (648 F.2d at 1110; App. 13a).

16).[13] It is little wonder that the District Court candidly observed that Petitioner's success in reversing the earlier dismissal of her claims could be characterized as a "pyrrhic victory."[14]

Finally, the undisputed facts established that both The University of Chicago and Northwestern University offered women places in their medical schools in disproportionately high numbers during the relevant time period. Chicago admitted 2.2% of all its female applicants from 1972 to 1975 but only 2.1% of its male applicants. (Aff. of Joseph Ceithaml, para. 4). Northwestern also offered admission to women in a higher proportion than their proportion of total applicants.[15] There is absolutely no

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[13] The University of Chicago admitted no applicant who scored below Petitioner in all three of these critical measures. Only four applicants were admitted who scored below her in any two of the three; three of these four were also female. At Northwestern, only one person who was admitted, a black female, scored below Petitioner in each of the three areas. Only seven scored lower in any two; five of the seven were black, and the other two were females. (Aff. of Dr. Charles A. Berry, para. 15).

[14] Thus, the facts here are in sharp contrast to those in *Regents of the University of California*, v. *Bakke*, *supra*, where the university stipulated that it could not show that, in the absence of its special admissions program for minorities, Bakke would not have been admitted. (438 U.S. at 280 (opinion of Powell, J.)).

[15] In 1973, women submitted only 16.24% of the applications at Northwestern but were issued 21.18% of the offers of admission. In 1974, women submitted only 19.12% of the applications but were issued 23.27% of the offers. In 1975, the year Petitioner applied, women submitted 21.43% of the applications but were issued 26.98% of the offers. (Aff. of Dr. Charles A. Berry, para. 17). (Footnote continued)

basis whatsoever for Petitioner's assertion that these respected institutions adopted sex-neutral age policies for the purpose of discriminating against female applicants.

CONCLUSION

For the reasons set forth herein, Respondents The University of Chicago, *et al.* and Northwestern University, *et al.* pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[15] (Continued)

This Court, under analogous circumstances in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 n.25 (1979), noted that, because the Authority employed a higher percentage of blacks and hispanics than the New York City workforce generally, plaintiffs "would be hard pressed" to demonstrate that a particular employment policy alleged to have a disparate impact on those groups was adopted with a discriminatory purpose.

Reply Brief

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ALEXANDER

No. 81-769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

The joint brief filed by the respondent schools in opposition to the petition for a writ of certiorari in No. 81-769, rewrites petitioner's argument and the record. It only appears to respond to the reasons for granting the writ set forth in the petition. In fact, it completely avoids doing so. The schools' argument, like the decision below, would convert every question of gender or racial discrimination under Title IX or Title VI into a constitutional question. That, in and of itself, is a sufficient reason for granting the writ.

1. The unanimous decision of this Court in *Lau* v. *Nichols* has not been overruled.

The schools cite only out-of-context statements by members of this Court to suggest (without stating directly) that *Lau* v. *Nichols*, 414 U.S. 563 (1974), "has been effectively overruled." (Jt. Br. p. 10). Respondents' argument is misleading because it appears under a heading referring to "decisions of this Court." The text of their argument fails to identify properly an important qualification——the statements on which they rely questioned only one possible "assumed premise" in the opinion of Justice Douglas, not the unanimous "decision" of this Court in *Lau*. (Jt. Br. pp. 8-10. *Cf.* Pet. Cert pp. 10-12).

No member of this Court has ever filed an opinion stating that the *decision* in *Lau* has been overruled, or that Congress intended Title VI or Title IX to limit or restrict the departments and agencies extending federal financial assistance to proscribing only the purposeful and intentional discrimination which violates the pre-existing mandates of the Fifth and Fourteenth Amendments. All that remains of the schools' argument is the bald and misleading assertion of their heading.

2. The conflict of the decision below with *Lau* is clear.

The conflict with *Lau* arises not, as respondents suggest, because of any unnecessary or abstract consideration of the congruence—or lack of congruence—*in all circumstances*, of the mandates of Title VI, Title IX and the Constitution. Rather it arises because here, as in *Lau*, HEW duly promulgated a specifically applicable regulation which was incorporated in the related federal funding contracts.

Under these circumstances, the crucial and proper question is whether the regulation goes beyond the authorization of the statute. *Lau, supra; Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). There simply is no need to consider whether the mandate of the statute or the Constitution, or both, "standing

alone", prohibits the policy or practice at issue, as suggested by respondents' citation of *Washington* v. *Davis*, 426 U.S. 229 (1976), *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), and *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979).

After structuring their basic argument on the identity of construction intended by Congress for Title VI and Title IX, the schools then disingenuously turn around and suggest that any conflict as to the current status of *Lau*, evident in recent decisions of the Courts of Appeals for the Second, Third and Fifth Circuits, should be settled by this Court in a case arising under Title VI rather than Title IX. (Jt. Br. pp.7-8 n.8. *Cf.* Pet. Cert. pp. 8 n.4, 9 n.5, and 12 n.6). However, the evidence of congressional intent to authorize regulations establishing an "effect" standard is *a fortiori* under Title IX as compared to Title VI. The HEW regulation establishing the "effect" standard under Title VI, 45 C.F.R. § 80.3, had been promulgated and in force for several years when Congress patterned Title IX on Title VI with the express anticipation of comparable regulations and enforcement procedures. *See, Cannon* v. *University of Chicago*, 441 U.S. 677, 696 n. 19. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Id.* at 711, quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976).

3. The "facts" on which the schools rely are not "undisputed" and do not establish the absence of sex discrimination.

The schools' effort to support the dismissal of petitioner's complaints for failure to state a claim with facts outside the allegations of the complaints is patently improper. (Jt. Br. pp 12-14). This Court previously stated that the "facts alleged in the[se] complaints .... establish a violation of § 901(a) of Title IX." *Cannon*, 441 U.S. at 680. The facts on which the schools rely are disputed and conflict directly with the allega-

tions of the verified complaints. (Pet. Cert. pp. 3,7, 12,13).

Respondents did not "offer women places in their medical schools in disproportionately high numbers". (Jt. Br. p. 13). Random selection among eligible persons receiving baccalaureate degrees during the relevant period of time could be expected to result in about 50%, not a mere 20%, of entering medical students being women. The "chilling effect" of respondents' policies on *actual* applicants was specifically noted by this Court in *Cannon,* 441 U.S. at 680-81 n. 2. Accordingly, the schools' reliance on the principle of *New York City Transit Authority* v. *Beazer,* 440 U.S. 568 (1979), is misplaced.

CONCLUSION

The respondent schools' attempt to minimize the direct conflict of the decision below with *Lau* by denying this Court's confirmation of the statutory authorization for an "effect" standard regulation, bares the flaw in their opposition to the petition. In light of respondents' inability to face the issues presented in the petition without grossly distorting the *Lau* decision, the need for plenary review of the action below is indisputable.

The importance and substantiality of the questions presented have not been denied. The only claim is that the decision below correctly held that this Court has already ruled that Congress intended to require every issue of discrimination under Title IX and Title VI be resolved as a constitutional issue. That claim is without foundation and, in and of itself, raises a significant issue justifying the grant of certiorari.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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